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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOHN McCORMICK,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Under the pleadings in this case there is no question of fact for the court to try. The rights of the respective parties under the grant to plaintiff and patent to defendant present purely questions of law. In support of this position we respectfully submit the following authorities and argument.

I.

a. The Court will take judicial notice of the date, conditions and provisions of plaintiff's grant, the same being a public statute, as well as a private grant, passed and approved *July 2nd, 1864.*

b. That the general route of plaintiff's railroad was fixed on the *21st day of February, 1872*, and that the definite line thereof was fixed, and a plat thereof filed with the Commissioner of the General Land Office, on *July 6th, 1882.*

c. That the completion of the road according to the terms and provisions of the grant is a condition subsequent. with which the United States alone can deal, and will be regarded as having been complied with for the purposes of this action.

II.

The *condition* of the land in question, at two periods, in this drama of title, will determine whether the same passed under this grant to plaintiff, i. e.,

First:—July 2nd, 1864, the time of its passage, to which the rights acquired date back for their inception.

Second:—July 6th, 1882, when the map of definite location was filed, at which time the condition of the land determined whether *such* rights were acquired.

This is plain from the express and unequivocal terms of the grant, and which has received the sanction of judicial interpretation.

Amacker vs. N. P. R. R. Co., 58 Federal, 850, C. C. of A.

Turner vs. Sawyer, 150 U. S., 578, a case where one party's claim was against the other and not where both were contesting as to which the United States should convey (which is the case here), and was a suit in equity.

Chandler vs. Calumet, 149 U. S., 79.

III.

(*a.*) The court will not inquire into the question as to whether the land was in condition to pass under the grant, if under any state of affairs it could go to defendant or his grantors. This was a question for the land department, and the issuance of the patent was a judicial declaration that *such facts* existed as took the land out of the grant, if under any conceivable circumstances it were possible to do so.

Colburn vs. N. P. R'y. Co., 34 Pac., 1017.
Johnson vs. Towsley, 13 Wall., 72.
Lee vs. Johnson, 116 U. S., 48.
Warren vs. Van Brunt, 19 Wall., 646.
Shepley vs. Cowan, 96 U. S., 530.
Marquey vs. Frisbie, 101 U. S., 473.
Vance vs. Burbank, 101 U. S., 514.
Quinby vs. Conlon, 104 U. S., 420.
St. Louis, etc., vs. Kemp, 104 U. S., 636.
Steele vs. Smelter, etc., 106 U. S., 447.
Baldwin vs. Stork, 107 U. S., 463.
U. S. vs. Minor, 114 U. S., 233.

b. A court of equity alone will reinvestigate these facts, and then only when a showing of fraud or mistake has prevented a fair hearing in the land office,—which is not claimed here.

Puget Mill Co. vs. Brown, 54 Fed., 991.
Lee vs. Johnson, 116 U. S., 48.
Johnson vs. Towsley, 13 Wall., 72.

c. Even if the land department had made a mistake in the application of the law to the facts as found, the finding

being conclusive, the courts of chancery alone exercise a supervisory power its decisions.

d. There are three instances, and no others, in which a patent can be impeached in a court of law.

1st: When it is absolutely void on its face.

2nd: When its issuance is without authority, or prohibited by law.

3rd: When the United States had parted with its title, and had none to pass by the patent.

Polk vs. Wendell, 9 Cranch, 87.
" " " 5 Wheat., 293.
Patterson vs. Winn, 11 Wheat., 380.
Stoddard vs. Chambers, 2 How., 284.
Rice vs. M. & N. R'y., 1 Black, 358.
Stone vs. U. S., 2 Wall, 525.
St. Louis, etc., vs. Kemp, 104 U. S., 636.

It is under the third and last ground that the plaintiff must recover, if at all.

As we have seen, the condition of the land at the time of the grant and filing of the map of definite location will determine whether the land passed under the grant, which is a fact for the land department; and the patent for the land to the defendants is conclusive in a court of law that such title did not pass under the grant, if under any conceivable state of facts it could be conveyed to the grantee in the patent. If such a *state of facts could* exist the patent is conclusive that they *did* exist. It is only in the instances where the patent can be impeached collaterally that ejectment can be maintained in the federal courts, as appears from the authorities heretofore

cited; and it is only when every *conceivable fact* to support it fails that the party asserting a right to the premises can go into a *court of equity* and have erroneous ruling of the land department corrected, proper legal principles applied, and the patentee declared to hold in trust for the rightful claimant.

It never was the intention of Congress that the passage of this grant to plaintiff should in any manner interfere with the disposition of questions of fact, by the land department of the Government, in determining controversies confided to it. Every fact, therefore, necessary to uphold the patent title in defendant will be conclusively presumed to have been found against plaintiff and in favor of defendant.

If under any condition of things a defendant could obtain a title in the face of plaintiff's grant, such condition of things will be deemed to be finally and absolutely established by the patent.

In French vs. Finn, 93 U. S. 166, the Court in commenting upon the effect of a patent, uses this language: "We are of " opinion that in this action of law, it would be a departure " from sound principles, and contrary to well settled judgments "in this court and others of high authority to permit the "validity of the patent to the state to be subjected to the "verdict of a court, or a court sitting as a jury, or a jury for "the tribunal which Congress has provided to determine the "question, and would be making a patent of the United States "a cheap and unstable reliance as a title for land which is pur- "ported to convey."

And in Steele vs. Smelting Co., 106 U. S., 417, Justice

Field said: "We have so often had occasion to speak of the "Land Department, the object of its creation, and powers it "possesses in the alienation by patent of portions of the public "lands, that it creates an unpleasant surprise to find that coun- "sel in discussing the effect to be given to the action of that "Department overlook our decisions on that subject. That "department, as we have repeatedly said, was established to "supervise various proceedings whereby a conveyance of title "of the United States to portions of the public domain is ob- "tained, and to see that the *requirements of different* acts of "Congress are fully complied with. Necessarily, therefore, "it must *consider* and *pass upon* the *qualifications* of the appli- "cant, the *acts* he has performed to secure the title, the *nature* "of the land and whether it is of the *class* which is *open for sale.* "Its judgment upon these matters is that of a special tribunal, "and is unassailable except by direct proceedings for its amend- "ment or limitation."

And in Smelting Co. vs. Kemp, 104 U. S. 846, the court in speaking upon the same subject, said: "Indeed the doctrine "as to the regularity and validity of its acts, when it has juris- "diction, goes so far as that *if in any circumstances under* exist- "ing laws a patent would be held valid, it will be presumed "that such circumstances existed."

And to the same effect is Redfield vs. Parks, 132 U. S., 245.

It is not claimed, and the grant itself emphatically discloses the fact, that it does not convey certain odd sections, but such only as are *free from pre-emption claims*, and *other claims*

or rights, leaving the *facts* to the land department to determine and thereby ascertain whether the land applied for comes within the grant, or is excepted out of it and subject to be conveyed by the patent.

See also:

Gale vs. Best, 20 Pacific Rep., 550, et seq., to which we call the especial attention of the Court.

So it is with plaintiff. The grant speaks throughout of a *conveyance of the land by patent to it*, and when it makes application therefor the question as to whether it passes by the grant or is excepted out of it is confined alone to the land department, and wherever the determination of this question involves a question of fact, as it does here, its decision is final and conclusive, as to the existence or non-existence of all essential matters of fact. The court will, therefore, in this action of law conclusively presume that the patent to defendant was carved out of the land reserved in plaintiff's grant. And this very patent under the authorities must date back to the first settlement and occupancy of the land, where as in this case it was continued down to the date of its issuance, for for the reason that no one else initiate a right to it while so occupied; and such was the ruling of this court as to the *claim* or *right* of any one except the government, as in Cahalan vs. McTague, 46 Federal Rep., 251.

There must be some time and place where the question as to what is *reserved* from the grant is determined; the appropriate place is the land department, whether upon issuing the patent to plaintiff under section four of the grant or to

And the court in Gale vs. Best, supra, in further consideration of this question says:

"It is contended by appellants that the former decisions of this court in McLaughlin vs. Powell, 50 California, 64; Carr vs. Quigley, 57 California, 394; and C. O. M. Co. vs. Oliver, 16 Pac. Rep., 780, are in conflict with the doctrine above stated. Whether or not there be any expression in the opinion in either of those cases inconsistent with the views of the highest federal court on the subject (which views in the end on a question like this must prevail) it is not necessary here to consider. In order to confirm the judgment in the case at bar there is no necessity to upset either of these cases. In McLaughlin vs. Powell the patent itself expressly excepted all mineral lands should any be found to exist in the tracts embraced in the patent. And the decision is put upon the ground that there was that exception and that it was 'part of the description' of the land conveyed, and it may be strongly argued that it was the duty of the land department to determine the character of the land before the issuance of patent, *yet, as the patent shows* upon its face that *such duty* was *not* performed, the patentee must be held to have taken it knowing its uncertain and unsubstantial character."

Conclusions necessarily and logically follow from all the decisions upon this question.

First:—When the right to a patent depends upon a *fact* to be ascertained and determined by the land department its findings are conclusive in a court of law.

Second:—That when there is a grant with a reservation of lands, which may be effected with other *claims* or *rights*, the land office necessarily passes upon these facts, and its findings are conclusive in a court of law.

Third:—The issuance of a patent is conclusive in a court of law that the lands were not embraced in the grant, but carved out by the reservation, and that there is not con-

sequently an attempt to grant the *title* to the *same* lands, to two different persons so as to render the patent void.

Fourth:—If such reservations *were contained* in the patent, or if *otherwise disclosed*, that the land office had not passed upon it, the courts of law *might* do so.

Fifth:—If there was an error of law committed by the land department in the interpretation of the grant, i. e., in giving the words "other rights or claims" a more comprehensive meaning than was intended by Congress, the remedy is by setting aside the patent or proceeding by suit in equity to declare the patentee a trustee for plaintiff and compel him to convey. If the land department has jurisdiction to pass upon the questions involved its decisions stand upon the same footing as a judgment erroneously entered by a court of competent jurisdiction. It is conclusive against all collateral attack. Here the land department not only is conclusively presumed to have passed upon the respective rights of the parties under the grant and pre-emption laws, but it affirmatively appears that plaintiff asserted its right and contested defendant's throughout the entire proceeding in that department. In such case it is questionable whether it could thereafter even maintain an equitable action, so as to revise any errors committed in the tribunal especially empowered to inquire into the questions involved.

The court in Gale vs. Best, supra, in further considering this question says: "Our opinion that when a patent issues "for public lands under a law which provides for its disposal "as agricultural lands either *to a railroad company* or to pre-

"emption or homestead claimants, and there is no reservation "in the law, except a general one of mineral lands, and no "reservation at all in the patent, then the patent must be con- "sidered as a conclusive determination by the government that "the land is agricultural."

So in this case the law *conclusively* presumes that if a filing upon the land within the time required of the occupant after the survey and return of the plats, was necessary to constitute a *claim* or *right*, that such filing and all other necessary acts were performed; this is the dignity given to a patent eminating from the government, and is conclusive against any admissions or concessions that might be made in a court of law.

See:

Bagnall vs Broderick, 13 Peter (U. S.), top p. 240.
Aurora H. C. M. Co. vs. 85 Mining Co., 34 Fed., 515.
Sioux City, etc., R. R. Co. vs. U. S., 34 Fed., 835.

"In a proceeding in equity to have the holder of a patent "to public land declared a trustee for the benefit of plaintiff, "the finding of the Secretary of the Interior as to the "*character and purpose of a settlement* is a *finding of fact* and "in the *absence* of *fraud* and *imposition* is conclusive."

Lee vs. Johnson, (Sec. 249) 116 U. S., 48.

If under any conceivable condition of *facts* the land department was authorized to issue the patent, as we have seen in the case here, it is *clear* and *plain* that a patent thus issued

cannot be questioned or attacked collaterally, and though it *may* be voidable, it *is not* void.

Baldwin vs Stark, 107 U. S., 463.

The question whether certain land is open for settlement or passed under certain railroad grant, requires the exercise of judicial *power* and *discretion by the land department* with which the Courts of the United States cannot interfere by injunction or otherwise.

Sioux City, etc., R. R. Co. vs. U. S., 34 Fed. R. 835.

See also opinion of this Court in following cases:

N. P. R. R. Co. vs. Sanders et al., 47 Fed. R. 604 et. seq.

Cahalan vs. McTague, 46 Fed. Rep., 253.

N. P. R. R. Co. vs. Sanders et. al., 49 Fed. Rep., 129 et seq., as bearing upon some of the questions involved in this case.

It will be noted that according to the undenied allegations of the answer the case has been stubbornly contested throughout the various branches of the land department and that a patent was issued to defendant. Aside then from the conclusive presumptions of all *possible facts* necessary to support it, the decision of the land department upon the propositions of *law* applicable to those *facts* is entitled to great weight in the courts.

Mr. Justice Miller in Hastings vs. Whitney, 132 U. S., 360, speaking for the court, says:

"The construction given to a statute by those charged with the duty of

executing it, is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. - - - The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterward called to interpret."

Hastings vs. Whitney, 132 U. S., 365.
U. S. vs. Moore, 95 U. S., 760.
Brown vs. U. S., 113 U. S., 568, 571, and cases cited.
U. S. vs. Burlington, etc., 98 U. S., 334, 341.
K. P. R'y vs. A. R. R'y, 112 U. S., 414, 418.

Again, as showing how the Supreme Court of the United States views the question of exacting such compliance with the law by a homestead or pre-emption claimant in Kansas Pac. vs. Dunnmeyer, 113 U. S. 629, the court says:

"It is not conceivable that the United States intended to place these parties (homestead and pre-emption on the one hand, the railway on the other), as contestants for the land with the right in each to acquire proof from the other of complete performance of its obligation. Least of all it is to be supposed that it was intended to raise up in antagonism to all the actual settlers on the soil, which it had invited to its occupation, this great corporation, with an interest to defeat their claims and to come between them and the government as to the performance of their obligations."

IV.

The determination of one single question, under the authorities, is conclusive of everything involved in this case. Did the land pass under the grant to plaintiff is the only remaining proposition to be considered. The issuance of the patent to defendant being admitted, the question as to whether the premises passed under the grant is controlled emphatically by the legal proposition, whether under any conceivable state

of facts, it was excluded from it, so as under any circumstances, it might be conveyed by the patent. The condition of the land at the time of the grant, and at the time of filing the map of definite location, are *facts* upon which the right of plaintiff under its grant depends, which was a matter to be ascertained and determined, and which has been ascertained and determined, as shown by the patent and undisputed averments in the answer.

Could any such state of facts exist?

The land was unsurveyed land at the time of the passage of the grant and at the time of the filing of the map, and for this reason it is urged that it could "not be reserved, sold, granted, or otherwise appropriated," and must under the law necessarily be "free from pre-emption or other *claims* or *rights*." The patent is a judicial declaration that all the denials set up in the replication, as well as every averment in the complaint upon which its validity depends, have been found adversely to plaintiff and are conclusive both in a court of law and equity, except in cases of fraud and mistake, of the *character* mentioned in the decisions cited.

We are not required here, as in the cases relied upon by plaintiff, to show that the *claim* or *right* of defendant or his predecessors in interest had so "*attached*" to the land as to seggregate it from the mass of public domain and place it beyond the control of the government. It is sufficient here to know that, under the existing condition of affairs, the government in its munificent grant to plaintiff recognized its paramount obligation to its subjects by preserving their just claims

and right of preference to the land thus settled upon and occupied by them. If the law-making power did not intend to recognize this kind of a claim or right, and wished to ignore everything that did not *attach* itself to the land, it would have stopped when it granted to plaintiff all odd sections within the limits of the grant "to which the United States had full title."

But two kinds of claims could in the nature of things exist.

First. Those which attached themselves to the land and effected the title.

Second. Those which the government was in equity and good conscience bound to preserve.

The former class was fully covered by limiting the operation of the grant "to the odd numbered sections of non-mineral public lands, to which the United States had full title, not reserved, sold, granted or otherwise appropriated and free from pre-emption;" and the latter was intended to be protected and preserved by the additional clause, "or other claims or rights." It is a general rule of interpretation that effect must be given to the whole of the language used, if it can be done without violating some cardinal principle of right and justice. Here, in order to give the language used *any force* whatever, and avoid an interpretation that would stamp the government with an act of injustice and reproach in dispossessing a citizen and occupant of lands it had invited him to possess and, as we shall hereafter see, made laws for his protection and benefit, there

was a claim and right initiated by defendant and his predecessors, not so as to *attach* to the land and prevent its withdrawal from the market, but which placed the government under the highest obligation to secure to the occupant and settler the just and reasonable expectation that if the land was sold or disposed of he should have the preference in the purchase of it, which is the *question under the grant*. In every sale or disposition of the public domain, the portion sold or disposed of is withdrawn from market; hence the all important question is what was sold or disposed of to plaintiff—what passed by its grant? If the claim and rights about which we have spoken are protected and were in force, as is the case here, at the time of the definite location of the line of plaintiff's railroad, and took the land out of the grant, it is of little consequence to it whether the land was withdrawn from market or not; the failure, if any, occurs on account of a non-compliance of the occupant and settler, and inures to the benefit of the government in such case, if it is disposed to enter for condition broken, and not to the plaintiff. In addition to what we have said upon the subject of the withdrawal of lands so occupied from sale, we are also led to inquire the object and purposes of the withdrawal, so as to assist us in determining what has actually been withdrawn under the grant. There could be no object in withdrawing from sale any lands not embraced in the grant; it would be no protection to plaintiff, and besides it conflicts with the manifest policy of the government in encouraging the settlement and development of the country.

Indeed if no surveys were made or likely soon to be

made at the time of the grant, it would be tantamount with the withdrawal from settlement and occupancy both *odd* and *even* sections, unless the government intended to subject the occupant and settler to the peril of being ousted at any time from his premises. No one could ascertain from odd sections. Hence, in reason, the government would naturally assure to such settler protection in his settlement, and in making the grant reserved whatever rights he had acquired, at the time of the definite location of the road. And so it is, if the claim or right we have discussed, is entitled to protection, the land is reserved from the grant, and not included in the odd sections, and not withdrawn from sale. The reasoning of counsel for plaintiff is specious when he assumes that all lands withdrawn from market are embraced in the grant, and that this land was withdrawn from market and consequently embraced in the grant. The correct doctrine is that no land not embraced in the grant is withdrawn from market; this land is not embraced in the grant, and consequently not withdrawn from market. The propositions thus announced must each stand or fall upon the determination of the question whether it was or was not the intention of the government to preserve the claim or right of an occupant and settler upon the public domain, who made his settlement under the invitation of the government and the assurance that if it sold or disposed of the land he should have the privilege of purchasing. While it was uncertain on account of the want of surveys to ascertain what lands would come under the grant, it therefore became certain by the definite location of the road and the ascertainment of what settlement and occupancy was upon the land at that time. It is this alone that anchors the grant and

fastens it upon the odd sections not thus occupied and settled upon. The fact, if such is the case, that the settler acquired no right or claim to the land, before filing upon it, that was capable of being enforced against the government, does not therefore establish the fact that plaintiff did. Its rights, as we have seen, depend upon something else besides the full title in the government, and are dependent upon the land being free from claim or right of a settler or occupant. An option against all other purchasers, is a right, and when claimed, is a claim in the sense used in the grant, and the patent conclusively assumes that this option was accepted, was claimed, and was a right, which the government in its integrity and good faith, ought to, and did, reserve in its grant to the plaintiff.

If defendant had such a right or claim that would have been recognized and preserved; its claim will not be heard in its clamor for the lands of those settlers, nor will its claim be heeded by a benign and just government, which was in honor bound to protect their possessions. It will be presumed under such circumstances that it intended to protect them, if the language will admit of that construction; it does so admit it, and the demands of justice are thus subserved.

With what has been said let us examine the decisions cited by counsel for plaintiff to maintain the proposition that the defendant had no such claim or right as that contemplated in the grant to plaintiff. Upon this question hinges the merits of this contention, and the applicability of all the other authorities to which he has referred.

Keeping in view the distinction between a right or claim

to a preference in making an entry of public lands, subject to the control of the government, and a right of pre-emption to the land as against the government, and bearing in mind that this preference as against all others was in *esse* and full of force at the time of the grant to plaintiff, and in so far as defendant is concerned at the very time of the definite location of the line of its road, we will see at once that the precise point was not involved in the determination of any of the cases cited by counsel for plaintiff. Taking them in the order in which they appear in the brief and argument, they have presented on the trial of the demurrer, we are first met with Buxton vs. Travers, 130 U. S., 282, et seq. This was a case involving the rights of an executor or administrator or one of the heirs of a deceased person *entitled* to the *benefit* of the pre-emption laws at the time of his decease by filing in due time all the papers essential to the establishment of the same to acquire a patent thereto for the benefit of the heirs. A comparison of the two acts of Congress under which the parties in that case laid their claims and the one under which the respective parties here are asserting their claim or rights, will make apparent the distinctions we have shown.

The former statute in so far as applicable reads as follows:

"When a party *entitled* to *claim* the *benefits* of the *pre-emption laws* dies before consummating his claims by *filing* in *due time* all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such case shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned."

The provision of the grant, applicable here, read as follows:

"Sec. 3. That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land *not mineral*, designated by odd numbers, to the extent of twenty alternate sections per mile, on each side of said road line, as said company may adopt, through the Territories of the United States, * * * and wherever on the line thereof, the United States shall have *full title* not *reserved, sold or otherwise appropriated and free from pre-emption, or other claims or rights*, at the time the *line* of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office."

The foregoing is the granting clause and described the land conveyed by the grant. The provisions of Section 6 defining what lands are withdrawn from the market, in so far as applicable, and to be construed in *pari materia* with Section 3, reads as follows: "And the odd sections of land *thereby* "*granted* shall not be liable to sale, entry or pre-emption be- "fore or after they are surveyed, except by said company as "provided by said act." (Italics ours.) So that the lands which are *free from pre-emption* and *other claims* or *rights* at the *time* of the definite location of the road are *alone granted* and *reserved* from *sale, entry* or *pre-emption.*

It will be seen at once that no claim or right could possibly exist under the former statute except it be one "en- "titled to claim the benefit of the pre-emption laws," which necessarily attaches itself to the land, while the provisions of the grant are broad and comprehensive enought to include claims or rights to a preference of an occupant and settler to initiate a right and claim such as that mentioned in the former

act. It is needless to go further into the examination of the facts presented in Buxton vs. Travis, supra, for the reason that the law applicable there is not applicable here, and anything that might therefore be said, apparently applicable here would be obiter and not binding as authority on this court. It would seem, however, that the court, in order to elucidate its position, refers to and quotes from the other two cases cited by counsel where the question involved a like determination of vested rights as against the government, and not such rights as are susceptible of being enforced against third parties who accept a grant subject to them. Wherever there is a duty, there is a corresponding right; it may not have all the elements of a contract so as to make it binding, yet is nevertheless a right that may be secured by the observance of the obligation, and the question here is, has the United States ignored this duty by placing it beyond its power to comply? Nothing short of unequivocal, emphatic and unmistakable language, requiring an interpretation that would entail upon the government such a desertion of its duty, will impel the courts to do so. The cases cited are wanting in every element involved in this, while the language used fairly contemplated a carrying out of the moral obligation imposed upon the government, and which will be assumed was intended to be preserved by the reservations in the grant. The government here did not *limit its reservation* to vested rights in the land, or such as might prevail in legal proceedings as against it and its grantee, but went further and embraced other *claims* and *rights* which it was under obligations to recognize, and in this, the case at bar, naturally differs from Frisbie vs. Whitney, and the Yosemite Valley case, supra.

We shall briefly refer to the only cases cited by counsel for plaintiff which in our opinion shed any light or have an bearing upon the propositions presented in this case.

The first is that of the Kansas Pacific Railway Co. vs. Dunmeyer, 113 U. S., 629, et seq. The language of Section 3 in the grant to plaintiff in that case is as follows:

"Every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof and within the limits of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time of the line of said road is definitely filed."

This grant was made in 1862, and embraces lands, as will be seen, "to which a pre-emption or homestead claim has "not *attached* at the time the line of said road is definitely "filed."

What consternation this may have created among such settlers as this defendant and his predecessors in interest, or whatever other cogent reasons that may have actuated Congress, it is enough to know that in its grant to plaintiff in 1864 the word *attached* was eliminated, and in addition to those contained in the grant to the Kansas Pacific Railway Company, the reservation extended not only to lands not *sold*, *reserved* or *otherwise disposed of*, but also such as were not "free from pre-emption, or *other claims* or *rights*." We call the especial attention of the court to that part of the opinion of Mr. Justice Miller in the case last cited, from pages 638 to 644 inclusive, as directly bearing upon the questions involved, and quote from page 644, showing the grounds upon which

the land in *that* case was held not to be embraced in the grant. He says: "Of all the words in the English language the "word *attached* was probably the best that could have been "used. It did not mean mere settlement, residence or culti- "vation of the land, but it meant a proceeding in the proper "land office by which the *inchoate rights* to the land was "*initiated*," (italics ours) thereby implying that such *settlement*, *residence* and *cultivation* when construed in connection with rights under a grant, and not as against the government, was an inchoate right and would have been respected by the court if something more had not been required of the claimant, i. e., his right must have been such as *attached* to the land. It is that *inchoate* right we are seeking to protect under a grant with the word *attached* eliminated and reservations more comprehensive than those contained in the grant to the Kansas Pacific Railroad Company.

We next find the same principle announced, and the language of Mr. Justice Miller quoted approvingly by the court in Hastings, etc. R. R. Co. vs. Whitney, 132 U. S. 361 and 362. We respectfully submit that these cases involved the interpretation of grants, with reservations, inapplicable here, and are in favor of defendant. We insist that counsel for plaintiff is woefully in error when he asserts: "It is settled that such "settlement and occupancy will not operate to take land out "of the category of free from pre-emption, or other claims or "rights," and cites these as controlling decisions in support of his assertions.

Upon the false premises thus announced, counsel proceeds to assume that the land in question was "reserved from

sale, pre-emption or entry by operation of law at the time of the location of the general line of the road on February 21st, 1862, for the benefit of the company, and that no subsequent claim could attach to the land." We have seen that *unless* embraced in plaintiff's grant it was not so withdrawn, and shown, that by the terms of the grant, and decisions, that it was not embraced in it, and for this reason insist that the authorities cited by counsel for plaintiff under that head were utterly inapplicable. The final conclusion reached by counsel for plaintiff is that the patent subsequently issued to defendant is void, and he cites numerous authorities to the effect that the government cannot make two valid grants of the same property to different individuals. We shall not certainly take issue on this proposition, but deny its applicability here. If the government had made an unqualified grant to the plaintiff of *all* odd sections of land in certain limits, and this was embraced within the limits, the applicability of the authorities would be apparent. But when the grant is subject to the important qualification, that when it is shown as a fact that the land was settled upon and occupied by a bona fide pre-emptor, at the time of the grant, and location of the definite line of the road, it is an inchoate claim and right, which excepts it from the grant, that the land office is the sole judge of these facts, and that the patent exclusively assumes that such facts exist, a very different conclusion is necessarily reached. It irresistibly follows that no two grants have been made to different parties; that the land was not embraced in plaintiff's grant, and consequently never withdrawn from the mass of public domain so as to defeat defendant's application for a patent un-

der his inchoate claim and right, and that its issuance conveyed to him the legal title to the land in question.

It is of no consequence to plaintiff whether the land was actually withdrawn from market, so long as it is not embraced in its grant. It must show a legal title and recover upon the strength of it.

But under plaintiff's grant it is not necessary that the lands should be surveyed and that a filing upon the land by a homestead or pre-emption claimant should be made, so as to attach it to the land and thereby initiate a right that would take it out of the grant. The right to make such a survey after filing is a *claim* and *right* secured to the settler and just what is excluded from plaintiff's grant. Under the laws of the United States, there is a right or claim which gives precedence to the occupant to file on his land after the survey and become the purchaser to the exclusion of all others, in the highest sense a valuable and effectual claim or right, which may be merged, as was the case here, into a perfect title. By Section 2257 *all lands* belonging to the United States, to which the Indian title is extinguished, or may hereafter be extinguished, is expressly made subject to pre-emption.

It is as follows:

"Section 2257. All land belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption under the conditions, restrictions and stipulations provided by law-"

Section 2259 declares who are competent pre-emptors,

and what acts constitute a *pre-emption claim* and entitle the settler to enter the same. It reads as follows:

"Section 2259. Every person, being the head of a family, or widow, or single person, over twenty-one years of age; and a citizen of the United States, or having filed a declaration of intention to become such, as required by the naturalization laws, who has made or hereafter makes, a settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon, is authorized to enter with the Register of the Land Office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such lands."

Section 2264 provides for the filing of a declaratory statement, and for the making the necessary payment for the land, and in the event of a failure to comply, makes it subject to entry by any other purchaser. It reads:

"Section 2264. When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement describing the land settled upon and declaring his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof and payment within the several periods above named, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

Section 2265 is in reference to land not then proclaimed *for sale;* requires the *claimant* to make known his *claim* to the register of the proper land office within three months from the time of the settlement, and in the event of a failure

it goes to the *next settler* who complies with the law. Two important facts are here disclosed with reference to lands not then open to market:

First—The settler is denominated a *claimant*, and his rights denominated a *claim* before filing the declaratory statement and declares a forfeiture of "his claim" upon a failure to file the same. It reads as follows:

"Every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise, his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and has otherwise complied with the conditions of the law."

Second—Then after his claim is forfeited it goes to the "next in order of time," and not to the railroad.

Section 2266 defines what is necessary for settlers upon unsurveyed lands to do *after the survey* and return of the plats. It reads:

"In regard to settlements which are authorized upon unsurveyed lands, the pre-emption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approval of the plat of the township embracing such pre-emption settlement."

Section 2267 provides for proof and payment by *claimants* of lands under the two preceding sections. It reads as follows:

"All claimants of pre-emption rights, under the two preceding sections, shall, when no shorter time is prescribed by law, make the proper proof and

payment for the lands described within thirty months after the date prescribed therein, respectively, for filing their declaratory notices has expired."

And so it will be seen that settler and claimant are used interchangeably in these connections, those proclaimed for sale, and those not proclaimed for sale, were subject to the acquisition of *a claim* thereto prior to filing the declaratory statement mentioned, and that the lands *claimed*, if forfeited, went to the next settler, and not to the railroad.

Under this condition of things Section 2281, we insist, determines the legal questions involved and shows emphatically that such a state of facts, with reference to the surveyed and unsurveyed lands, or lands proclaimed for sale and those not proclaimed for sale, may exist, as to invest the claimant with a *claim* that takes the land out of the grant, and secures it to the next "settler" and not to the railroad, and that all settlers upon any such lands, prior to such withdrawal, are entitled to pre-empt the same. It reads as follows:

"All settlers upon public lands which have been or may be withdrawn from market in consequence of proposed railroads and who had settled thereon prior to such withdrawal, shall be entitled to pre-emption at the ordinary minimum to the lands settled on and cultivated by them; but they shall file the proper notices of their claims and make proof and payment as in other cases."

Hence, a settlement prior to the withdrawal, subjected the lands to succeeding settlers and not to the grant; and it is of no concern to plaintiff to whom the government conveys it, or whether they have complied with the law or not. Under former grants the pre-emption or homestead rights must have *attached*, which was construed by the supreme court un-

der the authorities cited, to require the filing of the declaratory statement.

But it will be seen that under the plaintiff's grant the word "attach" is left out, and the portion of the section applicable reads as follows: "not reserved, sold, granted or "otherwise appropriated, and free from pre-emption or other "claims or rights at the time the line of the said road is "definitely fixed." The patent therefore is conclusive of the fact that the lands were unsurveyed, that at the time of the withdrawal from the market it was settled upon and cultivated by a *claimant*, if necessary, followed up to and at the time of the location of the defendant railroad, and that the patentee complied with the law in all respects. The claim, settlement and cultivation before and at the time of the withdrawal relieved the land from the effect of the withdrawal, and subjected it to the rights of succeeding claimants and settlers; this is all that concerns plaintiff, and the patent is conclusive of these facts in this action at law. These facts made it public land and took it out of the grant and subjected it to defendant's claim under Section 3, Vol. 21, p. 141, Stat. U. S. It reads as follows:

"That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

By this section a *claim* and right to a homestead or pre-emption settler is secured upon unsurveyed lands, and as we

have seen he is entitled to thirty months after the survey to make his entry and filing in the land office. It cannot well be said that even under the grant considered by the court in Buxton vs. Travis, and Frisbie vs. Whitney, supra, had the decision been controlled by Section 3, that the court would not have recognized the *settlement* and improvements, with a view to acquiring title under the pre-emption and homestead laws, as the initiative of a *right* which *attached* to the land as *against the government*. It is certainly so as against plaintiff under the terms of its grant, which omits the word *attached*, and adds thereto "homestead or pre-emption, or other claims or rights."

While it is conclusively presumed from the patent that the defendant and his predecessors occupied the premises in accordance with the homestead and pre-emption laws so as to take the same out of the grant to the plaintiff, it will also be conclusively presumed, in this action at law, that defendant made his filing in three months after the survey of the land and return of the plats, so as to entitle him to a patent. The alleged contest throughout all the stages of the proceedings in the land department is not denied. No bill in equity has been filed seeking directly to impeach the legality or validity of those proceedings, upon which the patent is based, and there is consequently nothing for the court to examine into in this action at law, save whether under any condition of affairs the land could be excluded from the grant as has been uniformally held by the Supreme Court of the United States.

It is useless to recall the attention of the court to Lee vs. Johnson, 116 U. S., 48; Pugett Mill Co. vs. Brown, 54 Fed.

R. 991; Johnson vs. Towsley, supra, and other decisions heretofore quoted upon this point.

See also *Turner vs. Sawyer*, 150 U. S., 578.
Chandler vs. Calumet & H. M. Co., 149 U. S., 79.

Indeed the condition of the land with respect to the occupying and improvement of it, at two periods during the existence of the grant, is all that is necessary to include in or except the same from its operation.

First—The dates of the grants.

Second—The date of filing the map of definite location of plaintiff's railroad.

Amacker vs. N. P. Ry. Co., 58 Fed. R., 851, 854 (C. C. of A.)

These *facts* and the *law* applicable to them have been passed upon and neither can be reviewed in this kind of an action.

It is clear and plain that the occupancy and improvement of the land by pre-emptioner or homesteader at the time of the grant and definite location of the line of the road takes it out of the grant, which is all that concerns plaintiff, and that by filing upon it within the three months after the survey and return of the plats entitles defendant to a patent, and presents a condition of things which makes the patent conclusive in this action.

And so it is the patent is conclusive of the following facts:

First—That the land did not pass under the grant to the plaintiff.

Second—That the defendant and his predecessors occupying and improving the same were qualified to pre-empt or homestead it.

Third—That the necessary occupancy, improvement and filing was made to entitle defendant to a patent.

Fourth—The facts being conclusive, if there is any error in the application of the law to them, it cannot be raised in this action of ejectment.

The averments in the complaint of the qualifications of the predecessors in interest of defendant as pre-emptors, the occupancy and improvement at the time of the grant, at the time of the location of the general route, at the time of the location and filing of the plat of the definite line of the road, the filing upon the land within "three months from the receipt at the district land office of the approved plat of the township embracing the pre-emption settlement" on these unsurveyed lands, and the payment and register and receiver's receipt, are bare recitals of fact upon which the *patent* is based, and which in the absence of fraud practiced upon *plaintiff* as well as the *legal deductions* therefrom by the land department are conclusive in this action at law. The right of defendant to commute his entry to a homestead under the law is a matter that interests only the United States, and is of no consequence to plaintiff. The claim and right of the settler on unsurveyed lands to perfect his title by a compliance with the statute is a valuable right, perfect in all respects, and

a failure to perform the conditions does not inure to the benefit of plaintiff, but to the government.

Upon these points we might add the following authorities.

Baldwin vs. Stark, 107 U. S., 463.
Sioux City, Etc., vs. U. S., 34 Fed. R., 835.
Aurora Hill vs. 85 Mining Co., 34 Fed. R., 515.
Carr vs. Fife, 44 Fed., 713.
Lee vs. Johnson, 116 U. S., 48.
Steele vs. Smelting Co., 106 U. S., 447.

This *right* and *claim* on unsurveyed lands by a settler to file upon it within the three months is recognized by the law and decisions and is the *right* and *claim* inserted in plaintiff's grant in lieu of the word *attached* as it occurred in former similar grants.

Quinby vs. Conlon, 104 U. S., at pages 425–426.

Whether this right and claim is one that could be ignored by the government before the survey and filing is made is not the question involved. It is enough to know that it has not ignored, but on the contrary, reserved these rights from the grant for the benefit of those whom it had intended to settle upon and improve the public domain, and this is not in conflict with Shipley vs. Cowan, 91 U. S., 338, *but in direct accord* with the views there expressed.

But let us assume for the purposes of this case that the officers of the land department made an erroneous application of law in assuming that the facts invested the defendant and his predecessors with such a claim and right to the land as

took it out of, or rather did not include it in, the grant to the plaintiff, as claimed by plaintiff, then, under the decision in Johnson vs. Towsley, supra, and the many other authorities in line with it, plaintiff can only get relief in a court of equity, and its claim in this action of law must yield to the superior title of defendant under his patent.

Hence, assuming that the doctrine announced in Buxton vs. Travis, and like cases, is applicable here, which we deny, the court cannot correct the error in an action of ejectment.

The judicial determination of the question that the land is not included in the grant cannot be treated as a nullity, and is only voidable in the mode pointed out by the foregoing decisions.

The grant to plaintiff carries all odd sections within the prescribed limits, non-mineral in character, "which are free "from pre-emption or other claims or rights, at the *time* the "line of said railroad is *definitely fixed.*"

It cannot be successfully claimed that the United States in this grant has not protected the rights of a "*bona fide* pre-emption claimant" who was such at the time of the definite location of the line of the road, and which it *might* have disregarded and included in the grant. The *authorities* cited by plaintiff show that it had a right to dispose of lands thus held by a "*bona fide* pre-emption claimant," while the *grant* to the plaintiff shows that it did not see proper to exercise that right, and herein lies the gravamen of this contention. The pre-emption laws recognize one who settles upon the public

unsurveyed lands with a view to obtaining title thereunder as a *bona fide pre-emption claimant* in its full sense, and gives him three months after the survey and filing of the township plats to make his filing as such settler. The Supreme Court of the United States in construing the phrase "*bona fide* pre-emption claimant" makes it synonymous with pre-emption claimant, which would comprise a settler in good faith *before* survey, and at the time of the location of the *definite line* of the road. In Hosmer vs. Wallace, 97 U. S., 581, the court says: "The term *bona fide*, as applied to pre-emption "claimant, does not change the qualifications of such claimant, "nor the conditions upon which, under the general law, a settle- "ment with a view to pre-emption is permitted. It was in- "tended to designate one who had settled upon land subject to "pre-emption, with the intention to acquire its title, and had "complied, or *was proceeding to comply*, in good faith, with "the requirements of the law to perfect his right to it. The "plaintiff does not come within this class."

The land department after a full and fair contest has declared defendant to be *such a claimant*, or to have such a *claim* or *right* by the patent issued to him, and it is conclusive in a court of law that such claim or right existed if under any conceivable state of facts it could exist at all. It is clear that such state of facts could exist, and the plaintiff's motion should prevail.

Barden vs. N. P. R. R. Co., 154 U. S., 288.
Especially *Buenavesta, etc., vs. Tulare, etc.*, 67 F. (Advance), 226.

It will be seen that it is the *ruling* of the land department

or officer or tribunal entrusted with passing upon the character of the land that gives *certainty* end *effect* to the grant and conveys the legal title, and that the patent is conclusive evidence that it has been so passed upon in a court of law. Hence, if that department in the proceedings had in this case, for it had declared that the land was free from pre-emption and other claims or rights and passed under the grant, and a patent was *thereafter* issued to defendant, Wright vs. Roseberry, 121 U. S., 488, would be applicable.

We respectfully submit that the following legal deductions are the result of an unbroken line of decisions of the Supreme Court of the United States upon the questions here presented.

1.

That when a grant is directly made to an individual or corporation by Congress for a *particular* tract or parcel of land, the legal title passes to the grantee, and the subsequent issuance of a United States Patent therefor to another person or corporation is void.

2.

That when a grant is made by Congress to certain portions of the public domain, non-mineral in character, and not otherwise appropriated and free from pre-emption or other claims or rights at a particular time, and no officer or tribunal is designated to pass upon the question as to whether the land is such as to pass under the grant, that power and duty is devolved upon the land department, and its judgment therein is conclusive in an *action at law*.

3.

That the *patent* issued by the land department in such case is conclusive evidence that this power and duty has been properly exercised and carries the *legal title* to the patented lands.

4.

That when the question of whether certain lands passed under the grant is left to the land department, or a certain officer, or tribunal, and it has failed to pass upon the question referred to it, then the courts may pass upon the same as an original question and determine the same; or where an absolute grant is made to the same specific piece of land, or where two patents are issued to different individuals to the *same* specific piece of land, a court of law will look into the facts to see who holds the *legal title.*

5.

That where a grant is made under the foregoing conditions and the land department, or officer, or tribunal, upon whom is devolved the power and duty of determining whether the land is such as is carried by the grant acts, and its judgment is that it was, the grant thereupon becomes fixed and absolute, and the legal title is conveyed by it, and a patent thereafter issued for the same land is void. (121 U. S., 488).

6.

That if the determination in such case is against the grant and a patent is issued accordingly to a homesteader, or

pre-emption, or mineral claimant, it is conclusive of the *legal title*, and can only be assailed in a suit in equity.

7.

That in a suit in equity in such case the complainant cannot declare upon an alleged *legal title* and have the patent declared void as a cloud upon such title, as is the case of the Northern Pacific Railroad vs. Cannon, et al., but such suit must be upon the equitable title to declare the patentee a trustee and compel him to convey the legal title.

8.

That in such suit in equity the court, where a proper showing of fraud is made, will review the facts, as well as the principles of law applicable to the case, and render such decree as it may deem proper in the premises.

9.

That in this case it appears that the legal title to the land in question under the grant depended upon its status, or condition, at the time of the grant and definite location of the line of plaintiff's railroad, or especially the latter, and that the land department has passed upon the question already adversely to the plaintiff by the patent pleaded in defendant's answer and undenied, it necessarily follows that this court in this *action at law* cannot consider the facts upon which the patent must depend for its validity or the questions of law applicable thereto, upon which said patent is based, and defendant's motion should be granted.

In connection with the authorities heretofore presented

we submit the following references to the Statutes of the United States, bearing upon the questions involved.

We shall assume that under the decision of the courts these principles are firmly and unequivocably established.

First—That where any question of fact is left open for the determination of the land department, upon which a United States patent may issue, under any conceivable condition of things, the issuance of a patent by that department is a determination that the facts upon which the patent depends for its support exist, and that the title thereby conveyed must prevail in a *court of law.*

Second—That the land granted to plaintiff under Section 3 of its grant of certain specific lands, but conditioned on becoming odd sections, within defined boundaries, "and free from pre-emption, or other claims, or rights, at the time the line of said railroad is definitely fixed." And that the land department has by issuing the patent conclusively determined in so far as this action of ejectment is concerned, that the conditions existed which took it out of the grant.

Hence, there is but one single question to be determined here under the grant upon the one side and the patent upon the other. Could any condition of facts exist upon which the land department might issue the patent? If there was, it should prevail, and if not, plaintiff should recover upon its grant.

By Section 2257 *all lands* belonging to the United States, to which the Indian title is extinguished, or may hereafter be extinguished, are expressly made subject to pre-emption. Sec-

tion 2259 declares who are competent pre-emptors, and what acts constitute a *pre-emption right*, and entitle the settler to enter the same.

Section 2264 provides for the filing of a declaratory statement, and for making the necessary payment for the land, and in the event of a failure to comply, makes it "subject to entry by any other purchaser."

Section 2265 is in reference to land not then proclaimed *for sale;* requires the *claimant* to make known his *claim* to the register of the proper land office within three months from the date of the settlement, and in the event of a failure, it goes to the next settler, who complies with the law. Two important facts are here disclosed with reference to lands not then open to market.

First, the settler is denominated a *claimant*, and his rights denominated a *claim* before filing the declaratory statement and declares a forfeiture of "his claim" upon a failure to file the same.

Second, that after his claim is forfeited it goes to the next "settler" in the order of time, and not to the railroad.

Section 2266 defines what is necessary for settlers upon unsurveyed lands to do after the survey and return of the plats.

Section 2267 provides for proof and payment by *claimants* of lands under the two preceding sections.

And so it will be seen that settler and claimant are used interchangeably in these connections, those proclaimed for

sale, and those not proclaimed for sale were subject to the acquisition of a *claim* thereto prior to filing the declaratory statement mentioned, and that the lands *claimed*, if forfeited, went to the next settler, and not to the railroad.

Under this condition of things, Section 2,281, we insist, determines the legal questions involved and shows emphatically that such a state of facts, with reference to surveyed and unsurveyed lands, or lands proclaimed for sale, and those not proclaimed for sale, may exist, as to invest the claimant with a *claim* that takes the land out of the grant and secures it to the "next settler and not to the railroad, and that all settlers upon "any such lands prior to such withdrawal are not entitled to "pre-empt the same."

Hence, a settlement prior to the withdrawal subjected the land to succeeding *settlers* and not to the grant, and it is of no concern to plaintiff to whom the government conveys it, or whether they have complied with the law or not. Under former grants the pre-emption or homestead rights must have *attached*, which was construed by the Supreme Court, under the authorities cited supra, to require the filing of the declaratory statement.

But it will be seen that under plaintiff's grant the word "attach" is left out and the portion of the section applicable reads as follows: "Not reserved, sold granted or otherwise "appropriated, and free from pre-emption or other claims or "rights at the time the line of said road is definitely fixed." The patent therefore is conclusive of the fact that the lands were unsurveyed, that at the time of withdrawal from the market it was settled upon and cultivated by a *claimant*, if

necessary, followed up to and at the time of the location of the plaintiff's railroad and that the patentee complied with the law in all respects. The claim, settlement and cultivation before and at the time of the withdrawal, relieve the land from the effects of the withdrawal, and subjected it to the rights of succeeding claimants and settlers; this is all that concerns plaintiff, and the patent is conclusive of these facts in this action at law.

These facts made it public land and took it out of the grant and subjected it to Section 3, Vol. 21, p. 141, Stat. U. S.

It is of no consequence whatever whether the answer sets up affirmatively all or any of the facts which were necessary to be determined by the land department in the issuance of the patent. It is the patent, which is conceded to have been issued, that is conclusive of every fact that is necessary to uphold it, whether such facts be pleaded or not. It is the ultimate and material fact in so far as the questions here presented are concerned.

We desire to apologize to the court for the length and incoherence of this brief. The brief of plaintiff in error was served upon us three days ago, while we were engaged in the trial of an important ease, and we have hurriedly prepared an answer, which we could have greatly condensed had the time been afforded us to do so.

Very respectfully submitted,

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